

**ITW Case study no: 2****Battle to exclude tobacco industry from Section 135 Companies Act, 2013****ABOUT:**

Tamil Nadu People's Forum for Tobacco Control (TNPFTC) was initiated in 2009 at Chennai by Mr. Cyril Mathew. It is a network of individuals, professional associations, like minded organizations and institutions who actively work on tobacco control.

Its activities include:

- Advocacy for policy change which would curb the tobacco industry's influence and promotion of tobacco products
- Monitoring the tobacco industry's activities especially with regards to their violation of tobacco control laws and tactics to manipulate the public's perception about the industry
- Creating IEC materials and awareness among the public with regards to the ill effects of tobacco
- Bringing out People's manifesto that is in line with tobacco control policies before the parliamentary or assembly elections

**BACKGROUND:**

Section 135 of the Companies Act 2013, requires that every company having net worth of Rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall spend, in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility (CSR) policy. To spend the said amount, the company shall constitute a Corporate Social Responsibility committee that will formulate and recommend a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII of the Act. The intention behind enacting Section 135 is that companies through their CSR activities develop the local area around where it operates.

**CHALLENGE:**

Tobacco companies through the provision of Section 135 of Companies Act 2013 will be able to earn goodwill and credibility in the eyes of general public and policy makers through enhanced involvement in CSR activities and will also utilize this opportunity to promote their brands through direct and indirect advertising.

**ACTION:**

**October 2013** - Led by TNPFTC, the tobacco control community launched a signature campaign to garner public support to exclude tobacco industry from Section 135 of Companies Act, 2013. This campaign generated massive support with signatures and messages/representations pouring in from across the country to exclude tobacco industry from involvement in CSR activities.

**November 2013**—The representation received was then sent to the Ministry of Corporate Affairs (MoCA) and Ministry of Health & Family Welfare (MoHFW) requesting them to exclude tobacco industry from Section 135.

**January 2014** - Based on the representations sent, the Secretary, MoHFW sent a letter to Secretary, MoCA favoring the exclusion of tobacco industry from Section 135 or for paying the 2% into a fund operated by Ministry of Corporate Affairs. A committee which includes representatives from Ministry of Health could then identify appropriate recipients. This would have the advantage of breaking the link between the donor industry and recipients/social action.

**April 2014** - Following inaction, TNPFTC filed a Public Interest Litigation (PIL) in Madras High Court on April 3<sup>rd</sup>, 2014 seeking the following relief:

- 1) Exclude the Tobacco Industry from the purview of CSR mandated under section 135 of Companies Act, 2013 to prevent it from earning goodwill and prevent direct (or) indirect advertising of tobacco products
- 2) Formulate a scheme for payment to the Central government by the tobacco companies the amount to be spent by them under CSR scheme to meet various medical expenses for the persons affected by the tobacco and other products and for furthering the National Tobacco Control Program and initiatives

**August 2014** – The Madras High Court passed a judgement saying that the matter under consideration was of government policy and hence directed the concerned authorities to see how best the CSR scheme of tobacco industry can be met and what model to be framed for the same. The High Court gave four months for the appropriate action by MoCA and MoHFW.

Following this, TNPFTC wrote to the then Union Minister of Corporate Affairs Shri. Arun Jaitley and Union Minister of Health & Family Welfare Dr. Harsh Vardhan apprising them regarding the judgement passed by Madras High Court and requested them to inform of any further actions taken by the respective ministries.

**April 2015** – An RTI filed by TNPFTC revealed that an inter-ministerial panel was formed in December 2014 and its first consultation was held in January 2015 attended by representatives from MoCA, MoHFW, All India Institute of Medical Sciences (AIIMS), New Delhi & WHO.

As a part of background for the meeting one of the points mentioned was:

- a) The petitioner in the PIL in view of health hazard caused due to tobacco use and in view of Government statutory and international obligations for tobacco control, prayed for **excluding the tobacco industry from the purview of CSR scheme or to formulate a scheme to ensure that the tobacco manufacturers pay to the Central government the amount to be spent by them under CSR to meet various medical expenses for the persons affected by tobacco**

The following decisions were taken in the meeting:

- 1) As an immediate measure, MoCA need to amend their Schedule or rule pertaining to CSR activities under section 467 (1) of the Act and include a provision that requires a tobacco company to deposit their CSR contributed (as provided) in a specified fund mentioned in the existing rules (eg: **Prime Minister's National Relief Fund PMNRF**) or a common pool.
- 2) As a long term measure the section 135 needs to be amended by inserting a provision that will ensure that a tobacco company does not in any manner **misuse** the general requirement

of contributing 2% of their profit for CSR activities for directly or indirectly promoting their trade/brand name and the product they manufacture

- 3) Since the time frame of four months to develop a CSR model for contribution by tobacco companies has lapsed, the MoCA should file an affidavit/application apprising the honourable Madras High Court about constitution of the committee and decisions taken

**May 2015** – TNPFTC sent written clarifications for the above mentioned decisions taken in the inter-ministerial meeting:

1) Depositing to PMNRF would be a violation of WHO FCTC Article 5.3 since it would provide an opportunity for tobacco industry to interact with the government officials and influence policy making

2) If the word misuse is used there is a high possibility that tobacco industry would conduct CSR for their benefit and mention that they have not misused the provision. For example, by investing in building toilets for girls in school, wherein they would actually be using this as an opportunity to get into schools to improve their brand image. There are various examples of how term 'misuse' could be manipulated by tobacco industry. Thus a request was made to not give tobacco industry any opportunity and exclude them from Section 135 completely.

**June 2015** – Legal notices were sent by TNPFTC to MoHFW and MoCA for alleged contempt of order of Madras High Court by not implementing the court's judgement

The MoCA responded to the legal notice in the month of September citing a letter sent in the month of June to MoHFW making the following point:

Section 5 of COTPA Act, 2003 already prohibits direct or indirect advertisement of cigarettes and other tobacco products. Provisions of CSR under the Companies Act, 2013 does not impinge on any law of the land (including COTPA, 2003). Enforcement of COTPA, 2003 should be sufficient to address the issue.

MoHFW responded to the legal notice by stating that, MoHFW has taken following steps to prevent CSR activities by tobacco companies:

- (i) An Inter-Ministerial Committee was constituted on 18.12.2014 to devise a mechanism to ensure that the tobacco companies do not derive any unintended incidental benefit of their activities under CSR, which enables them to either promote their business or to create an impression that their business is not prejudicial to public interest.
- (ii) An amendment to Section 5 of COTPA, 2003, has been proposed vide the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Amendment Bill, 2015, including provision that specifically prohibits tobacco companies from promoting their products/trademarks through CSR activities. The Bill is presently under pre-legislative consultation.

The decisions taken in 1<sup>st</sup> meeting was reiterated in the second meeting held on June 5<sup>th</sup> 2015 and since there is difference of opinion between MoCA and MoHFW on the issue, the opinion/ advice of Ministry of Law, Government of India (GoI) is to be sought.

**OUTCOME:**

The issue is currently under the purview of Ministry of Law, GoI and is pending resolution.

**CONCLUSION:**

In spite of a favourable High Court judgement in August last year which set a time frame of four months the issue has still not reached a logical conclusion. However persistent efforts by TNPFTC through filing RTI application and representations has forced the Government to act and kept the issue alive. This clearly highlights the hurdles that tobacco control advocates face at each and every step to strengthen tobacco control policies and also the persistence required to achieve an expected outcome.

We congratulate Cyril Mathew and TNPFTC for the sustained efforts and offer all support to take on the tobacco industry.

**IndiaTobaccoWatch (ITW)** is an initiative by organizations working in tobacco control across India to monitor and counter the activities of tobacco industry. Spread the word.

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